No. 6126

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANCES MACKINNON PUSEY, GEORGE G. MACKINNON, WILLIAM H. MACKINNON, JR., FRANCES MACKINNON COIT and JOHN S. DELANUEY, Guardian of JOHN MACKINNON DELANCEY, a Minor,
Appellees.

BRIEF FOR APPELLANT

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Appellees.

APPELLANT'S MOTION TO STRIKE BILL OF EXCEPTIONS

This is an appeal by the United States, plaintiff below, from a judgment of the District Court entered on October 10, 1929 [R. 55].

FACTS

After the appeal was taken and after the record on appeal was filed, appellee moved to strike the bill of exceptions from the record herein on the ground that it was not signed, settled, allowed, or filed within the

time allowed by law. (Similar motions were made in the trial court [R. 138-147]).

The July 1929 term of court was extended to *March 1, 1930,* by two court orders; the first order, which was signed and filed four days after judgment, extended the term to January 29, 1930 [R. 56]; the second and final order [R. 57], was signed and filed on January 27, 1930, two days before the time set by the first order for the expiration of the trial term.

The time within which to serve and file plaintiff's bill of exceptions was also extended by said orders to February 20, 1930, the first order extending the time to January 29, 1930 [R. 57].

Plaintiff's proposed bill was served and lodged on *February 8, 1930* [R. 136]. It was settled and allowed by the trial Judge on *February 28, 1930* [R. 135], which was within that portion of the July term which was created by the second order.

Hearing on appellee's motion by this Court was had on May 12, 1930, at which time the matter was submitted for decision. Thereafter this Court ordered the submission set aside and the matter continued to the time of hearing of the cause on appeal herein.

QUESTION

Was the second order of the trial Judge made January 27, 1930, valid for the purpose of extending the July 1929 term? If it was, the bill of exceptions was admittedly filed within the time and term allowed by law.

STATUTES AND RULES

By Statute (28 USC 145) the July term of Court commences the second Monday in July and the next succeeding term commences the first Monday in November. Rule 9 of the Rules of Practice for the United States District Court for the Northern District of California (Rules of January 1, 1912, as amended), provided:

> "For the purpose of making and filing bills of exceptions and of making any and all motions necessary to be made within the term at which any judgment or decree is entered, each term of this Court shall be and hereby is extended so as to comprise a period of three calendar months beginning on the first Tuesday of the month in which verdict is rendered or judgment or decree entered."

Rule 8 of the present Rules (effective July 1, 1928), superseded the above rule, and provides:

> "For the purpose of making and filing bills of exceptions and of making any and all motions in connection therewith, together with motions for new trials and petitions for rehearings, each term of this Court shall be and hereby is extended so as to comprise a period of three calendar months beginning on the date on which verdict is rendered or judgment or decree entered."

Rule 32 provides, so far as material, that when an act is to be done relating to the preparation of bills of exceptions, the time allowed by these rules may, unless otherwise specially provided, be extended by the court or judge by order made before the expiration of such time, but that no such extension or extensions shall exceed thirty days in all without the consent of the adverse party.

Rule 45, so far as material, provides that the time within which the bill and amendments are required to be served and filed may be extended by order of court.

ARGUMENT

A statutory term of court once commenced continues until the beginning of the next term, unless finally adjourned in the meantime.

Harlan v. McGourin, 218 U. S. 442, 450.

The rule that a federal court has power to extend its terms for specified times, is too well settled to require the citation of authority.

Maison v. Arnold, 16 F. (2d) 977 (certiorari denied 273 U. S. 766).

A statutory term of court may be extended (1) by standing order; or (2) by *special order made during* the judgment term and *any valid extension thereof.*

Great Northern Ins. Co. v. Dixon (CCA-8), 22 F. (2d) 655, 657;
Cudahy Packing Co. v. City of Omaha (CCA-8), 24 F. (2d) 3, 6;
Stickel v. U. S. (CCA-8), 294 Fed. 808, 810;
Exporters v. Butterworth Co., 258 U. S. 365, 368.
In Re Bills of Exception (CCA-6), 37 F. (2d) 849, 852.

Counsel, we believe, has misconstrued the decision in the case of *O'Connell v. U. S.,* 253 U. S. 145 (affirming this circuit).

This has, no doubt, been caused by loose language used by the Eighth Circuit in the Cudahy and Stickel cases (supra). It says in the Stickel case, page 810:

"The orders of extension held to be beyond the jurisdiction of the trial court in some of those

> cases were made after the expiration of the times limited by general rules for making such extensions, as in the O'Connell Case, or after the expiration of the terms of court and of the extensions lawfully granted."

And in the Cudahy case, at page 6:

> "Counsel evidently rely upon the principle announced by the Ninth Circuit in Anderson et al. v. United States (C.C.A.) 269 F. 65: 'After the expiration of the term at which a judgment was rendered and of any extended time allowed by rule of court for settling a bill of exceptions, the court is without jurisdiction to grant any further extension of time, and such jurisdiction cannot be conferred by consent of counsel'—citing, among other cases, O'Connell v. United States, 253 U. S. 142, 40 S. Ct. 444, 64 L. Ed. 827."

The O'Connell case does not hold, as it may seem from the above quoted language, that the court cannot extend its term by order made within that term to a time beyond the time specified in a standing rule. Nor does the Anderson case.

In each of these cases no order extending term was made and the question of the power of the Court to make such an order, in or out of term, was not raised.

The only orders under consideration in the O'Connell and Anderson cases were orders extending time to file bill of exceptions. In each, the first of the series of orders was not made until after the trial term had expired. In neither case did the court hold that former Rule 9 (supra), operated, so far as bills of exceptions were concerned, as anything more than a standing rule of final adjuornment of the term.

Had the Eighth Circuit in the Stickel and Cudahy cases carefully analyzed the holdings of the Ninth Circuit in the cases referred to, the decisions in the Stickel and Cudahy cases would have been quite like the decision by the Eighth Circuit in *Great Northern Ins. v. Dixon* (supra).

In conclusion we submit that, providing the Court makes its special order (extending term) within the time prescribed by Rule 9 (now Rule 8), it may thereafter at any time within the term as extended either by said special order or by a subsequent order (made within the time prescribed by the first order),—settle the bill of exceptions.

That it may do so in spite of a rule, such as rule 32, supra, is well settled.

Cavana v. Addison (CCA-9), 18 F. (2d) 278, 279, and cases there cited.

THE APPEAL

FACTS

The original complaint and bill in equity [R. 2] discloses that the United States, having collected from the estate of William H. Mackinnon, who died January 16, 1921, the sum of $13,359.85 as an estate tax thereon, erroneously refunded to the defendants, the sole legatees of the deceased, the sum of $11,287.10 ($1,848.44 of which was interest), on the erroneous theory that only one-half of the community property in said estate was taxable. The United States sought by this bill to establish a lien on the distributive share of said legatees

for the repayment of said sum. After trial and submission, but before decision thereon, the court pursuant to the decision in *Kelly v. U. S.* (CCA-9), 30 F. (2d) 193, made its order transferring the cause to the law side of the court; whereupon plaintiff filed an amended complaint [R. 33] and defendants answered [R. 42] counterclaiming [R. 44] for the amount of tax claimed by and paid to the government from said estate upon a certain transfer of property made by decedent in his lifetime to his wife which defendants claimed was not made in contemplation of death. The exact amount of said counterclaim is not stated therein but may be readily determined by taking the difference between the Commissioner's value of the net estate ($454,689.12) [R. 39 and 40] and the alleged value of the transferred property ($368,376.00) [R. 44], and applying § 401 of the Revenue Act of 1918 (40 Stat. 1057), the result is $12,133.59 or $846.49 more than the amount claimed by plaintiff. Plaintiff demurred [R. 48] to this counterclaim and the demurrer was overruled at the time of trial [R. 60], and the cause was tried before a jury resulting in a verdict [R. 53] for defendants. Upon this verdict judgment [R. 54] was entered. The trial court held that plaintiff was entitled to recover upon its cause of action and directed the jury to find for plaintiff unless they found that defendants had proved their counterclaim [R. 129]. The questions raised herein relate solely to the counterclaim and the subject matter upon which it is founded.

SPECIFICATIONS OF ERROR RELIED UPON

Plaintiff in error at the time of the allowance of the appeal filed assignments of error, seventeen in number [R. 148]. It hereby specifies as the errors upon which it will rely and urge upon hearing of the said appeal, the following:

> "I. The counterclaim set forth in defendants' amended answer to plaintiff's amended complaint, does not state facts sufficient to constitute a counterclaim."
>
> "III. The court erred in overruling the demurrer interposed by the plaintiff to the first, further and separate defense and counterclaim which defendants have attempted to set forth on pages 3 and 4 of the amended answer to plaintiff's amended complaint."
>
> "II. That the court has no jurisdiction of the subject matter of the claim set forth in defendants' amended answer to plaintiff's amended complaint as a counterclaim."
>
> "V. The court erred in denying plaintiff's motion for a directed verdict on defendants' counterclaim upon the ground that the evidence in the case thereon had not established a prima facie case on counterclaim and was legally insufficient to sustain a verdict for the reason that no evidence was introduced showing that the claim set forth in said counterclaim was ever presented to the accounting officers of the Treasury as required by Section 951 Revised Statutes (28 USC 774), and no evidence was offered to show that the defendants, or any of them, were, at the time of the trial, in possession of vouchers or other documents not before in their power to procure, and/or were prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or for any other cause whatsoever; to which ruling of the court plaintiff duly and regularly excepted at the time of the trial herein."

"VI. The Court erred in denying plaintiff's motion for a directed verdict at the close of all the evidence in said cause on plaintiff's cause of action for money had and received, on the ground that the evidence in this cause was such, as a matter of law, to entitle plaintiff to a verdict thereon; to which ruling of the court plaintiff duly and regularly excepted at the time of the trial herein."

"VII. The court erred in giving the last portion of the following instruction:

'You are instructed that the total gross estate of the said William H. Mackinnon was subject to the estate tax, and that the refund payments were occasioned by a mistake of law, and that the plaintiff is entitled to recover such payments from the defendant, Frances Mackinnon Pusey as money had and received, unless you find from the evidence that the defendants have established their alleged separate defense and counterclaim as set up in their amended answer.'

beginning with the words, 'unless you find' and reading as follows:

'unless you find from the evidence that the defendants have established their alleged separate defense and counterclaim as set up in their amended answer.'

To which the plaintiff duly and regularly excepted at the time of the trial herein."

STATUTES INVOLVED

Revised Statutes § 951 (28 USC 774):

"In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers

not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident."

THE QUESTIONS

Assignments Nos. I and III have to do with error appearing on the face of the record.

The United States demurrered to the answer on the ground that the claim does not state facts sufficient to constitute a cause of counterclaim against it, explaining that there was no allegation that the claim on which the counter-claim was based was ever presented to the Treasury Department as required by revised statutes § 951, (supra). The question is: Does § 951 make an allegation of presentment or allegations of matters to bring the claim within one of the statutory exceptions, a condition precedent to the right to counter-claim.

Assignments Nos. II, V, VI, and VII relate to jurisdiction of the subject matter of the action. The question is—Are defendants required to prove at the trial, in order to prevail in offsetting against the United States Government's claim, that their claim in offset was presented to the accounting officers of the Treasury and disallowed or that the facts necessary to bring it within the statutory exceptions exist. It may be otherwise stated thus: Has the court in the absence of such proof, jurisdiction of the subject matter of the counterclaim?

ARGUMENT

I.

NO RIGHT OF SET-OFF AT COMMON LAW

In *Hall v. United States,* 91 U. S. 559, Mr. Chief Justice Waite said, at page 652:

> "Defendant litigants had no right to file accounts in set-off at common law. * * * Questions of the kind, where the United States are plaintiffs, must be determined wholly by the acts of Congress, as the local laws have no application in such cases."

U. S. v. Robeson, 34 U. S. 319;
Watkins v. U. S., 76 U. S. 759.

REVISED STATUTES SECTION 951, CREATED ONLY A CONDITIONAL RIGHT

In *Western Union Rwy. Company v. U. S.,* 101 U. S. 543, the action was by the United States against a corporation of Wisconsin to recover certain Internal Revenue taxes. The defendant filed a general denial and in addition set up a counterclaim setting forth a claim for credit of several thousand dollars on account of taxes claimed to have been erroneously assessed. No demurrer was interposed to the counterclaim and no objection to the offer of evidence tending to prove that the defendant was entitled to credit was made. The District Court disallowed the claim. Mr. Chief Justice Waite for the Supreme Court stated, at page 548:

> "It does not appear that this claim was ever presented to the accounting officers of the treasury for allowance, on appeal or otherwise, or that it has ever been disallowed. For this reason notwithstanding its apparent equity, the credit was properly refused in this suit."

Yates v. U. S. (CCA-9), 90 Fed. 57;
U. S. v. Cantrell (DC Ore.) 176 Fed. 503.

PLEADER MUST ALLEGE FACTS ENTITLING HIM TO COUNTERCLAIM AGAINST THE UNITED STATES

In *United States v. Patterson* (CC Iowa) 91 Fed. 854, the Court said, at page 855:

> "The claim made by the defendant, whether called 'credit' or 'set-off,' should be so stated in the pleading as that the claim thereby is, on the face of the pleading, provable. Under the statute quoted, the claim is provable only when proper presentation has been made and disallowance in whole or in part followed. Therefore the claim is not properly pleaded unless such presentation and disallowance are also pleaded."

The counterclaim in the present action contains no allegation of presentation or disallowance nor does it contain allegations of matters tending to bring it within any one of the statutory exceptions. It is respectfully submitted that the counterclaim because of the omission of such allegations, does not state a cause of action on counterclaim in the present suit, and plaintiff's demurrer should therefore have been sustained.

II.

THE DISTRICT COURT HAD NO JURISDICTION OF THE SUBJECT MATTER OF THE COUNTERCLAIM

We submit that the question of jurisdiction over the subject matter of the action may be raised by objection at any time; by demurrer, if the defect is disclosed on the face of the petition; by motion for non-suit or directed verdict at the trial; or even for the first time on appeal.

Litigants in the absence of statutory consent, have no more right to off-set a claim against the sovereign in a

suit brought by it than have original suitors to sue the sovereign, *Hall v. U. S.* (supra). In the absence of consent by the sovereign, there is an absence of power in the court to subject the sovereign to judgments and decrees. The sovereign may therefore appear generally, defend the action on the merits and succesfully raise the jurisdictional question at any time.

Hill v. U. S., 50 U. S. 386;
Oregon v. Hitchcock, 202 U. S. 60;
Naganab v. Hitchcock, 202 U. S. 473;
New Mexico v. Lane, 243 U. S. 52;
Schillinger v. U. S., 115 U. S. 163.

On the other hand, the sovereign may consent to suit. But only the legislative body can give consent; the executive or his agents cannot bind the sovereign.

> "As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it." Marshall, C. J. in *U. S. v. Clarke,* 33 U. S. 436 (1854).

Carr v. U. S., 98 U. S. 433 (1879);
Stanley v. Schwalby, 162 U. S. 255 (1895).

See also recent decision in

Candee v. U. S. (CCA-9), No. 6036.

Furthermore, where consent is given, it may be taken away at the will of the Legislature, even after action has been brought.

Beers v. Arkansas, 61 U. S. 527 (1857).

The act of Congress under consideration here (§ 951 R. S.) expresses a conditional consent. Jurisdiction is conferred upon the courts to subject the United States

to judgment on counterclaim only in the event that defendants first present to the accounting officers of the Treasury or failing that, first show a sufficient statutory excuse. The plain meaning of the statute must be that where there is no compliance with the condition, there is no consent which would permit the defendant to counterclaim.

Western Union R. Co. v. U. S. (supra).

In the case at bar, defendants offer no evidence tending to prove compliance with the condition or tending to show that their claim comes within one of the statutory exceptions.

It therefore follows inevitably that appellants are praying for judgments against the sovereign in a situation where there is, in fact, no consent at all. As is said in *Rock Island etc. v. U. S.,* 254 U. S. 141 (1924):

> "Men must turn square corners when they deal with the government, and if it attaches even purely formal condition to its consent to be sued those conditions must be complied with. * * * At all events the words are there in the statute and the regulations and the court is of the opinion that they mark the conditions of the claimant's right."

The District Court had, therefore, no jurisdiction of the subject matter of the counterclaim.

CONCLUSION

From a consideration of the authorities with respect to the instant case in hearing, the plaintiff in error summarizes: That as against general demurrer the condition required by Revised Statutes § 951, must be alleged; that consequently it was error for the Court to overrule plaintiff's demurrer to said counterclaim; that in the absence of proof of compliance on the part of the defendants with the condition precedent the Court had no jurisdiction of the claim and the Court for this reason, erred in not instructing the jury to find for plaintiff. The judgment should be reversed.

Respectfully submitted,

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